

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ELICIA CUTSINGER,
Plaintiff,

v.

GYRUS ACMI, INC., GYRUS ACMI, L.P.,
OLYMPUS CORPORATION OF THE AMERICAS,
and OLYMPUS AMERICA,

Defendants.

Cause No. 4:18-cv-00004

MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE PARTIES

Amber Long and Jason Cutsinger, the surviving children of Elicia Cutsinger, by and through the undersigned counsel and pursuant to Fed. R. Civ. Pro. 25(a) file the following memorandum in support of the Motion to Substitute Parties:

1. Introduction and Background.

This is a products liability and negligence case alleging the PlasmaSORD device spread cancer throughout Ms. Cutsinger's abdomen and pelvis. As the Court is aware, on February 26, 2019, Ms. Cutsinger passed away. The death certificate lists the immediate cause of death as progression of metastatic sarcoma. Ex. A. Further, as the Court is aware, an autopsy was performed on Ms. Cutsinger to determine her cause of death. The autopsy report dated April 19, 2019, provides "It is our opinion that the cause of death of Elicia K. Cutsinger is dilated cardiomyopathy secondary to chemotherapy given for treatment of metastatic leiomyosarcoma." Ex. B.

The death certificate and autopsy report link Ms. Cutsinger's death to the conduct of Defendants and the condition of their product as described in the original complaint.

Put simply, according to the autopsy report, Ms. Cutsinger died from chemotherapy to treat metastatic sarcoma. The PlasmaSORD is what made her sarcoma metastatic. This case is now a wrongful death case.

2. Motion to Substitute Parties.

Fed. R. Civ. Pro 25(a)(1) provides:

(a) DEATH.

(1) *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

a. The Claim Is Not Extinguished.

Mo. St. 537.080 provides:

Whenever the **death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for:**

In this case, Ms. Cutsinger filed a claim for personal injuries against Defendants in relation to the PlasmaSORD device. By operation of Missouri statute, this claim is not extinguished by her death because the statute expressly provides an action may be maintained “notwithstanding the death.” *Id; see also Andrews v. Neer*, 253 F.3d 1052, 1058 (8th Cir. 2001) *citing Wollen*, 828 S.W.2d at 685 (“The Missouri Supreme Court has made it plain that . . . the personal action arising from his injury and death survives to the spouse or children or other descendants.”)

b. Ms. Cutsinger's Children Are the Proper Party.

An action for wrongful death may be brought by “the spouse or children or surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adopted.” Mo. St. 537.080(1). Ms. Cutsinger was not married at the time of her death. Ex. C at 140:22-141:16. She is survived by her son and daughter: Jason Cutsinger and Amber Long. *Id.* at 8:24-9:4. Pursuant to RSMo. § 537.080, the right of action for wrongful death rests with the children of Ms. Cutsinger – Amber Long and Jason Cutsinger.

c. This Motion Is Timely.

Fed. R. Civ. Pro 25(a) permits ninety (90) days to bring a substitution motion. The statement noting the death of Ms. Cutsinger was filed March 22, 2019. This motion is well within the time permitted to make a substitution of parties.

3. Conclusion

The motion to substitute should be granted to substitute Amber Long and Jason Cutsinger as parties to the suit as wrongful death claimants.

Dated: April 25, 2019

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify Plaintiff's Counsel has attempted to confer with Defendants via email on two occasions. Counsel for Plaintiff has not received a response whether Defendants are opposed or unopposed.

s/ Clint Casperson

CLINT CASPERSON

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2019, I electronically filed the foregoing document with the Clerk of the court using CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this case.

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